

TEXT OF FINAL REGULATIONS
ASSESSMENT OF ADMINISTRATIVE PENALTIES
Department Reference Number: R-97-24

Amend the Table of Contents by adding a new Article 3 to Chapter 22 of Division 4.5 of Title 22 of the California Code of Regulations to read as follows:

Chapter 22. Enforcement, Inspections, and Informant Rewards.

* * *

Article 3. Assessment of Administrative Penalties.

- § 66272.60. Applicability.
- § 66272.61. Penalty Calculation.
- § 66272.62. Determining the Initial Penalty for Each Violation.
- § 66272.63. Initial Penalty Adjustment Factors.
- § 66272.64. Multiple Violations.
- § 66272.65. Multiday Violations.
- § 66272.66. Minor Violations Subject to a Penalty.
- § 66272.67. Base Penalty.
- § 66272.68. Adjustments to the Total Base Penalty.
- § 66272.69. Final Penalty.

Add Title 22, Division 4.5, Chapter 22, Article 3, Section 66272.60 of the California Code of Regulations to read as follows:

§ 66272.60. Applicability.

(a) This article only applies to the assessment of administrative penalties in administrative enforcement orders issued pursuant to Health and Safety Code Section 25187. This article does not apply to minor violations as defined in Health and Safety Code Section 25117.6 unless the minor violation is ~~they are~~ subject to a penalty in accordance with Health and Safety Code Section 25187.8(g). This article does not apply to penalties assessed pursuant to Health and Safety Code Sections 25244.18(d)(2), 25244.21(a) and 25244.21(b) regarding requirements for source reduction evaluation review, plans, and reports. This article does not apply to the settlement of any enforcement action.

(b) For purposes of this article, ~~"enforcement agency"~~ "Enforcement Agency" is defined as any department, unified program agency, local health officer, or local public officer having the authority to issue administrative orders pursuant to Health and Safety Code Section 25187.

(c) ~~The enforcement agency~~ Enforcement Agency, ~~at each step of determining an assessed penalty amount for a violation, shall, pursuant to Health and Safety Code Section 25180(d),~~ determine whether the person being assessed a penalty is being treated equally and consistently with regard to the same types of violations previously assessed against other violators, ~~pursuant to Health and Safety Code Section 25180(d).~~

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25117.6, 25180(d), 25187, 25187.8(g), 25189.2, 25244.18(d)(2), 25244.21(a) and 25244.21(b), Health and Safety Code; and Section 11425.50, Government Code.

Add Title 22, Division 4.5, Chapter 22, Article 3, Section 66272.61 of the California Code of Regulations to read as follows:

§ 66272.61. Penalty Calculation.

Administrative penalties assessed in administrative enforcement orders issued pursuant to Health and Safety Code Section 25187 shall be assessed following the procedures set forth in this article. The penalty assessed for any violation ~~under~~ in accordance with this article shall not exceed the maximum ~~amount~~ penalty specified in statute.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

Add Title 22, Division 4.5, Chapter 22, Article 3, Section 66272.62 of the California Code of Regulations to read as follows:

§ 66272.62. Determining the Initial Penalty for Each Violation.

(a) ~~The enforcement agency~~ Enforcement Agency shall determine an initial penalty for each violation, considering ~~actual and~~ potential harm and the extent of deviation from hazardous waste management requirements. ~~The enforcement agency~~ Enforcement Agency shall use the matrix set forth in Subsection 66272.62(d) to determine the initial penalty for each violation.

(b) ~~Actual and~~ Potential Harm of the Violation

(1) ~~The enforcement agency~~ Enforcement Agency shall consider ~~actual and~~ potential harm to public health and safety and the environment when using the matrix. ~~Potential and actual harm shall be treated the same.~~

(2) The categories for degree of ~~actual and~~ potential harm are defined as follows:

(A) Major - The characteristics and/or amount of the substance involved present a major threat to human health or safety or the environment and the circumstances of the violation indicate a high potential for harm or, in the case of a violation of financial requirements, coverage is lacking or substantially below the required amount or it is certain or probable that the coverage would be absent or inadequate;

(B) Moderate - The characteristics and/or amount of the substance involved do not present a major threat to human health or safety or the environment, and the circumstances of the violation do not indicate a high potential for harm or, in the case of a violation of financial requirements, coverage is significantly below the required amount or it is possible that the coverage would be absent or inadequate;

(C) Minimal - The threat presented by the characteristics and the amount of the substance or by the circumstances of the violation are low or, in the case of a violation of financial requirements, coverage is slightly below the required amount or it is unlikely that the coverage would be absent or inadequate.

(3) In determining the degree of ~~actual and~~ potential harm, ~~the enforcement agency~~ Enforcement Agency shall consider the following factors:

- (A) The characteristics of the substance involved,
- (B) The amount of the substance involved,
- (C) The extent to which human life or health is threatened,
- (D) The extent to which animal life is threatened,
- (E) The extent to which the environment is threatened, and
- (F) The extent to which potable water supplies are threatened.

(4) Potential harm for violations of financial requirements shall be determined by

considering the amount of closure, postclosure, or corrective action costs for which there is no financial assurance or the amount of required liability coverage that is absent, and the likelihood that injury or damages, if they occur, will not be compensated due to an inadequacy in the coverage.

~~(4)~~ (5) A violation must involve the actual management of hazardous waste including the absence of adequate financial assurance for closure, postclosure, corrective action or financial liability coverage, as distinguished from being a “record-keeping” violation, for it the violation to have a major potential for harm. “Record-keeping,” for purposes of this article, means a requirement to record information, to retain records, and to have documents available for inspection. “Record-keeping” does not include a substantive requirement such as the requirement to have ~~plans such as~~ a contingency plan, a waste analysis plan, or a closure plan. The following examples illustrate what is considered “record-keeping” and what is considered a violation that could have a major actual or potential for harm.

(A) A failure to record inspections that were in fact ~~done~~ completed is a record-keeping violation and would not have a major potential for harm. A failure to ~~have an inspection schedule~~ conduct inspections according to the schedule is not a record-keeping violation and could have a major potential for harm depending on the circumstances.

(B) A failure to retain a copy of a manifest is a record-keeping violation and would not have a major potential for harm. A failure to use a manifest for a shipment of hazardous waste is not a record-keeping violation and could have a major potential for harm depending on the circumstances.

(C) A failure to have available for inspection a waste analysis plan that does in fact exist is a record-keeping violation and would not have a major potential for harm. A failure to have a waste analysis plan, or a failure to have a waste analysis plan available to staff who are to implement the plan, is not a record-keeping violation and could have a major potential for harm depending on the circumstances.

~~(5)~~ (6) Financial violations that are strictly paperwork errors or omissions that do not affect actual functioning of adequate financial assurance for closure, postclosure, corrective action, or financial liability coverage are record-keeping violations. Violations involving the absence of adequate financial assurance for closure, postclosure, corrective action, or financial liability coverage are hazardous waste management violations, not record-keeping violations.

~~(6)~~ (7) Groundwater monitoring record-keeping is a fundamental part of the groundwater monitoring requirements. Groundwater monitoring record-keeping violations may have a major, moderate, or minimal potential for harm. The category selected for ~~actual and~~ potential harm shall be based on the extent to which the violation may lead directly to environmental harm, have a potential for ~~actual~~ harm, or cause an inability to

detect releases to groundwater.

(c) Extent of Deviation of the Violation

(1) The ~~enforcement agency~~ Enforcement Agency shall consider the extent of deviation from hazardous waste management requirements when using the matrix set forth in this section.

(2) The categories for extent of deviation from requirements are defined as follows:

(A) Major - The act deviates from the requirement to such an extent that the requirement is completely ignored and none of its provisions are complied with, or the function of the requirement is rendered ineffective because some of its provisions are not complied with.

(B) Moderate - The act deviates from the requirement, but it functions to some extent ~~even though~~ although not all of its important provisions are complied with.

(C) Minimal - The act deviates somewhat from the requirement. The requirement functions nearly as intended, but, ~~in the judgment of the enforcement agency~~ not as quite well as if all provisions had been met.

(3) For requirements with more than one part, the ~~enforcement agency~~ Enforcement Agency shall consider the extent of violation in terms of the ~~more~~ most significant requirement.

(4) For a single requirement, the range of potential deviation from the requirement may vary. For example, if a facility has no contingency plan, the deviation would be major. If a facility has a contingency plan but significant elements are omitted, the deviation would be moderate. If a facility has a contingency plan with only one or two minor elements missing, the deviation would be minimal.

(d) The matrix set forth in this subsection shall be used to determine the initial penalty for a violation. The ~~enforcement agency~~ Enforcement Agency shall select a penalty amount from the range provided in the matrix cell that corresponds to the appropriate extent of deviation and the ~~actual and~~ potential harm categories. The numbers in parenthesis in each cell of the following matrix are the midpoints of the range.

DETERMINATION OF INITIAL PENALTY MATRIX
(in dollars)

EXTENT OF DEVIATION	ACTUAL AND POTENTIAL HARM		
	Major	Moderate	Minimal
Major	25,000 (22,500) 20,000	20,000 (17,500) 15,000	15,000 (10,500) 6,000

Moderate	20,000 (17,500) 15,000	15,000 (10,500) 6,000	6,000 (4,000) 2,000
Minimal	15,000 (10,500) 6,000	6,000 (4,000) 2,000	2,000 (1,000) 0

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

Add Title 22, Division 4.5, Chapter 22, Article 3, Section 66272.63 of the California Code of Regulations to read as follows:

§ 66272.63. Initial Penalty Adjustment Factors.

(a) After determining the initial penalty, the ~~enforcement agency~~ Enforcement Agency shall adjust the initial penalty based on the violator's intent in committing the violation using the following guidelines:

ADJUSTMENT FACTORS FOR VIOLATOR'S INTENT

ADJUSTMENT FACTOR	CIRCUMSTANCE
Downward adjustment of 100% percent	Violation was completely beyond the control of the violator.
Downward adjustment of 0 to 50% percent	Violation occurred even though <u>despite</u> good faith efforts to comply with regulations <u>regulation(s)</u> were made .
No adjustment	Violation indicated neither good faith efforts nor intentional failure to comply.
Upward adjustment of 50% percent to 100% percent	Violation was a result of intentional failure to comply.

(b) Adjustment of the initial penalty in accordance with ~~the factors provided in~~ subsection (a) may result in an adjusted initial penalty that is higher or lower than the range presented in the originally selected matrix cell.

(c) The initial penalty shall be increased by the amount of any economic benefit gained or cost of compliance avoided by the violator as a result of noncompliance up to the statutory maximum for each violation. Economic benefit includes, but is not limited to, avoided costs, ~~delayed costs~~, increased profits, having the use of capital from delayed or avoided costs, and avoided interest.

(d) ~~In no case shall the~~ The adjusted initial penalty for a violation shall not exceed the statutory maximum.

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Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

Add Title 22, Division 4.5, Chapter 22, Article 3, Section 66272.64 of the California Code of Regulations to read as follows:

§ 66272.64. Multiple Violations.

(a) At the discretion of the ~~enforcement agency~~ Enforcement Agency, a single initial penalty may be assessed for multiple violations. Multiple violations subject to this section are multiple instances of the same violation, where each instance is a violation in itself.

(b) The assessment of a single initial penalty may be appropriate for multiple violations in the following cases:

(1) The facility has violated the same requirement ~~in different locations~~ at one or more locations (e.g. units) within the facility;

(2) ~~The facility has violated the same requirement on different days;~~ The violation occurs on separate occasions, unless the facility has been notified of the violation and has had sufficient time to correct the violation, and the violation is not a violation that continues uninterrupted for more than one day;

(3) When ~~the~~ violations are not independent or are not substantially distinguishable. For such violations, the Enforcement Agency shall consider the extent of violation in terms of the most significant violation.

(c) Where it is necessary to deprive the violator of the economic benefit of ~~the~~ multiple violations, the ~~enforcement agency~~ Enforcement Agency shall cite such violations separately and assess an initial penalty for each violation.

(d) The single initial penalty for multiple violations is to be determined as provided in Sections ~~66272.62(d)~~ 66272.62 and 66272.63.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections ~~25140.8.5~~, 25187 and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

Add Title 22, Division 4.5, Chapter 22, Article 3, Section 66272.65 of the California Code of Regulations to read as follows:

§ 66272.65. Multiday Violations.

~~(a) Notwithstanding that each and every violation is a separate and distinct offense and, for continuing violations, that each~~ Each day the ~~a~~ violation continues is a separate and distinct violation; ~~a single penalty may be assessed for a multiday violation. When a penalty is assessed for a continuing violation, the~~ The penalty for a continuing violation shall be determined according to this section.

(1) The initial penalty for the first day of violation shall be determined as provided in Sections 66272.62 and 66272.63;

(2) For days following the first day of violation, the multiday component of the penalty shall be calculated by determining ~~whether multiday penalties for the violation are mandatory, presumed, or discretionary, as follows:~~ two percent of the adjusted initial penalty and multiplying that value by the number of days the violation occurred after the initial day.

~~———(A) Mandatory. Multiday penalties are mandatory for days 2-180 for all violations with the following designations, pursuant to the matrix set forth in Section 66272.62(d): major harm-major deviation and major harm-moderate deviation. Multiday penalties for days 181+ are discretionary:~~

~~———(B) Presumed. Multiday penalties shall be presumed to be appropriate for days 2-180 for all violations with the following designations, pursuant to the matrix set forth in Section 66272.62(d): major harm-minimal deviation, moderate harm-major deviation, moderate harm-moderate deviation, and minimal harm-major deviation. This requirement may be waived by the enforcement agency for one or more days if case-specific facts support such a waiver. Multiday penalties for days 181+ are discretionary:~~

~~———(C) Discretionary. Multiday penalties are discretionary for days 2-180 for all violations with the following designations, pursuant to the matrix set forth in Section 66272.62(d): moderate harm-minimal deviation, minimal harm-moderate deviation, and minimal harm-minimal deviation, and for all days past 180 days of mandatory and presumed multiday penalty violations. Discretionary multiday penalties may be imposed for some or all days:~~

~~———(3) Factors: In determining whether to assess multiday penalties for days 2-180 for violations for which multiday penalties are presumed appropriate or are discretionary, as well as for days past 180 days for all violations, the enforcement agency shall consider:~~

~~———(A) Whether the multiday penalty reflects the gravity of the violations and~~

~~———(B) Whether the multiday penalty deters future noncompliance.~~

~~(4) Multiday Matrix: The matrix set forth in this subsection shall be used to determine the multiday component of the penalty.~~

Determination of Multiday Penalty Matrix (in dollars)			
Extent of Deviation	Actual and Potential Harm		
	Major	Moderate	Minimal
Major	5,000	2,200	600
	(3,000)	(1,300)	(350)
	1,000	400	100
Moderate	4,000	1,600	300
	(2,375)	(925)	(200)
	750	250	100
Minimal	3,000	1,000	75
	(1,775)	(575)	(50)
	550	150	25

~~(5) The multiday penalty shall be determined by locating the penalty range in the matrix cell that corresponds to the initial penalty designation (e.g., major-major, major-moderate, etc.) made pursuant to Section 66272.62(d). A dollar amount shall be selected from the range. The selected dollar figure is then multiplied by the number of days the violation occurred. (Note: The number of days used in the multiday penalty calculation is the duration of the violation minus one day to account for the first day of violation, whose penalty is determined pursuant to Sections 66272.62 and 66272.63).~~

~~(b) This section does not preclude the assessment of penalties for multiday violations up to the statutory maximum for each day of any violation. In circumstances where there has been significant harm, or it is necessary in order to deprive the violator of the economic benefit of the violation, or there was a continuing threat to human health or the environment, it may be appropriate to assess the statutory maximum.~~

~~(c) The amount of penalty assessed for additional days may be reduced if compliance efforts made by the violator resulted in a reduction in the potential for harm associated with the violation and/or the extent of deviation during a continuing period of violation.~~

~~(d) (b) If the enforcement agency Enforcement Agency fails to respond in a timely manner to the violator's written response to an inspection report, the enforcement agency Enforcement Agency may not seek penalties for continuing violations in accordance with Health and Safety Code Section 25185(c)(3).~~

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Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25185, 25187, and 25189.2, Health and Safety Code; and Section 11425.50, Government Code.

Add Title 22, Division 4.5, Chapter 22, Article 3, Section 66272.66 of the California Code of Regulations to read as follows:

§ 66272.66. Minor Violations Subject to a Penalty.

When a “minor violation,” as defined by Health and Safety Code Section 25117.6, is subject to a penalty for any of the reasons specified in Health and Safety Code Section 25187.8(g), including that a penalty is warranted or required by federal law, the penalty for that violation shall be determined in accordance with ~~Sections 66272.62 and 66272.63 for the initial penalty and for multiple minor violations, Section 66272.64~~ this Article. ~~Where it is appropriate to assess a single penalty for multiday minor violations, the multiday component of the penalty shall be calculated in accordance with Section 66272.65.~~ Written findings that set forth the basis for the ~~enforcement agency’s~~ Enforcement Agency’s determination to assess a penalty for a minor violation shall be made in accordance with Health and Safety Code Section 25187.8(g)(2).

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Section 25117.6, 25187.8 and 25189 Health and Safety Code; and Section 11425.50, Government Code.

Add Title 22, Division 4.5, Chapter 22, Article 3, Section 66272.67 of the California Code of Regulations to read as follows:

§ 66272.67. Base Penalty.

(a) If a violation is a one day occurrence, the base penalty for that violation is the adjusted initial penalty as determined pursuant to Sections 66272.62 and 66272.63.

(b) The base penalty for multiple violations is the adjusted initial penalty determined pursuant to Section 66272.64.

~~(c) (b)~~ The base penalty for multiday violations is the adjusted initial penalty for the first day of violation determined pursuant to Sections 66272.62 and 66272.63 plus the penalty for the additional days of violation pursuant to Section 66272.65.

~~(d) (e)~~ The total base penalty for an enforcement action is the sum of the base penalties for all violations.

(e) The total base penalty shall not exceed the statutory maximum.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code.

Reference: Section 25187 and 25189.2 Health and Safety Code; and Section 11425.50, Government Code.

Add Title 22, Division 4.5, Chapter 22, Article 3, Section 66272.68 of the California Code of Regulations to read as follows:

§ 66272.68. Adjustments to the Total Base Penalty.

The ~~enforcement agency~~ Enforcement Agency shall adjust the total base penalty considering each of the following adjustment factors:

(a) Cooperation: The ~~enforcement agency~~ Enforcement Agency shall consider the violator's cooperation and efforts to return to compliance. Cooperation in achieving compliance is the standard and all necessary good faith efforts to comply with requirements must be made. Adjustments shall be based on the violator's efforts to return to compliance after being notified of the violations by the ~~enforcement agency~~ Enforcement Agency. The adjustment shall be made using the following guidelines:

ADJUSTMENT FACTORS FOR COOPERATION

DEGREE OF COOPERATION/ EFFORT	ADJUSTMENT FACTOR	CIRCUMSTANCE
Extraordinary	Downward adjustment of <u>up to</u> 25 percent	Violator exceeded the minimum requirements in returning to compliance or returned to compliance faster than requested.
Good Faith	No adjustment	Violator demonstrated a cooperative effort.
Recalcitrance	Upward adjustment of <u>up to</u> 25 percent	Violator failed to cooperate, delayed compliance, created unnecessary obstacles to achieving compliance, or the compliance submittal failed to meet requirements.
Refusal	Upward adjustment of 50 to 100 percent	Violator intentionally failed to return to compliance with the regulations or to allow clean-up operations to take place. This does not include refusal to allow inspections.

(b) Prophylactic Effect: The total base penalty may be adjusted upward or

downward to ensure that the penalty is sufficient to provide a prophylactic effect on both the violator and the regulated community as a whole.

(c) Compliance History: The total base penalty may be decreased by five percent for each previous consecutive Enforcement Agency inspection report that has had no violations noted, up to a total reduction of ten percent. A separate, additional downward adjustment of 15 percent may be granted if the violator has a current International Organization for Standardization (ISO) 14001 Certificate. The total base penalty may be increased if the violator has demonstrated a history of noncompliance over the past five (5) years. The maximum adjustment factor for compliance history is an upward adjustment of 100 percent. When adjusting the penalty for compliance history, the ~~enforcement agency~~ Enforcement Agency shall consider the following criteria:

- (1) Previous violations at the site in question receive more weight than previous violations at another site owned or operated by the same person;
- (2) Recent violations receive more weight than older violations;
- (3) The same or substantially similar previous violations receive more weight than previous unrelated violations.

(d) Ability to Pay: If the violator has provided the ~~enforcement agency~~ Enforcement Agency with the financial information necessary to assess the violator's ability to pay, the payment of the final penalty may be extended over a period of time if immediate, full payment would cause, in the judgment of the ~~enforcement agency~~ Enforcement Agency, extreme financial hardship. If extending the penalty payment over a period of time would cause, in the judgment of the ~~enforcement agency~~ Enforcement Agency, extreme financial hardship, the penalty may be reduced. No adjustment for ability to pay may be made if the penalty has been adjusted upward because of failure to cooperate, pursuant to subsection (a), or because of compliance history, pursuant to subsection (c).

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2 Health and Safety Code; and Section 11425.50, Government Code.

Add Title 22, Division 4.5, Chapter 22, Article 3, Section 66272.69 of the California Code of Regulations to read as follows:

§ 66272.69. Final Penalty.

The final penalty consists of the total base penalty, as defined in Section 66272.67, with any adjustments made pursuant to the adjustment factors set forth in Section 66272.68. The final penalty shall not exceed the statutory maximum.

Note: Authority cited: Sections 25150 and 58012, Health and Safety Code. Reference: Sections 25187 and 25189.2 Health and Safety Code; and Section 11425.50, Government Code.